CHEONG VOON HAN v. THEVAN SUBRAMANIAM & ANOR

HIGH COURT MALAYA, SHAH ALAM
MOHAMAD SHARIFF ABU SAMAH JC
[CIVIL APPEAL NO: BA-12B-173-11-2017]
26 SEPTEMBER 2018

DAMAGES: *Personal injuries – Quantum – Appeal against – Appellant suffered serious head injuries causing permanent disabilities – Whether lower court judge sufficiently considered all issues raised – Whether misdirection of fact and law by lower court judge – Whether lower court judge correctly calculated appellant's actual income – Whether general damages and special damages increased*

The appellant claimed for general and special damages against the respondent for the injuries sustained due to the respondent's negligence. The respondent was alleged to have been driving at high speed and negligently without giving any signals and signs hit the appellant while the appellant was crossing the road from the right to the left. The appellant suffered serious head injuries and permanent disability. He also suffered significantly reduced hearing on his left ear. The appellant would also be unable to enjoy his usual recreational activities and unable to return to work. Both parties agreed and recorded that the appellant was at 50% liability and the respondent at 50% liability. The subject matter of the appeal was the quantum which was allowed on 100% basis.

Held (allowing appeal; reversing decision of Sessions Court):

(1) The appellant was only 37 years of age and was the sole breadwinner for his family with six children. Following the injuries, the appellant would not be able to perform any work, which would affect the source of income of his family. Apart from that, the appellant also had the tendency to be aggressive and violent without being able to control himself and had been emotionally disturbed. Due to the accident, the appellant had to undergo treatment for his lifetime especially psychiatric treatment and treatment for eyesight, hearing, erectile dysfunction and neurogenic bladder and constipation. Hence, the award of RM47,000 by the lower court for the severe head injuries with multiple intracranial haemorrhage and psychosis post traumatic brain injury was substituted with the amount of RM200,000. (paras 9-11)

(2) The appellant had lost his memory due to the accident. Having referred to the Revised Compendium of Personal Injury Awards, the award of RM5,000 was fair and justifiable as the appellant had not only suffered loss of consciousness but also retrograde amnesia. (para 12)

(3) After the accident, the appellant's sexual activity was restricted and the chances of getting children would be diminished. This would affect the quality of life, cause negative psychological impact on the family and cause a permanent disability. As such, the appellant was awarded a sum of RM30,000 for erectile dysfunction. Apart from that, the neorogenic bladder and constipation would definitely cause negative impact to the appellant and this would cause difficulties for him to perform any work. This had also caused a permanent disability to the appellant. In view of the permanent disability, the award of RM13,000 by the Sessions Court Judge ('SCJ') was increased to RM15,000. Further, as the appellant suffered 'erectile dysfunction', he would have to take 'Viagra' medication for the rest of his life. The appellant was awarded RM100,000 in special damages as costs of purchasing Viagra. (paras 13-15 & 23)

(4) For both eye trochlear nerve palsy resulting in double vision at all gaze and loss of depth perception, the SCJ awarded the sum of RM15,000. It was indicated in the medical report, *inter alia*, the visual aberration suffered by the appellant would result in slowness in most activity such as eating, reading papers, *etc*, and this was a permanent deficit. Further, the lack of depth perception meant that he was not suitable to drive and it might affect his job performance. In view of the injuries, the award was reviewed to RM40,000. The formal hearing assessment showed normal hearing on the right ear, whilst the left side showed profound sensorineural hearing loss based on pure tone audiometry. The SCJ did not fully consider this issue when no award was given to the appellant. Based on the Revised Guidelines for Awards in Personal Injury, the appellant was awarded the sum of RM20,000. (paras 16 & 18)

(5) The appellant was confirmed to have been suffering from 'degenerative spine disease L1 S1'. As a result, the appellant would not be able to carry heavy things and this condition would prolong for the whole life. Hence, the award of the SCJ was increased from RM20,000 to RM30,000. (para 17)

(6) For lacerations on the left pinna and scalp, the SCJ award was reviewed from RM4,500 to RM7,000. There were also multiple healed abrasion scars over hands and knees. In view of this permanent disability, the court allowed the sum of RM10,000. The appellant had undergone an operation to remove the glass fragments from the appellant's forehead. However, the issue was not considered by the SCJ and no award was made to the appellant. This court awarded RM2,000 to the appellant under this heading. (paras 19-21)

(7) The appellant worked as a car sprayer and had been receiving commission at an average of RM5,000 monthly. After the accident, there was no salary paid by the employer to the appellant. There was no explanation in the grounds of judgment of the SCJ as to how the multiplier of RM1,500 and multiplicand of 10 months was arrived at. Based on the authorities, it was clear that the SCJ had erred in the calculation of the appellant's actual income. The income was to be calculated as RM2,800 x 9 x 12 = RM302,400. As such, the appropriate award for the appellant would be RM300,000. (para 22)

Case(s) referred to:

Ang Yee Cheng & Anor v. Ang Siang Hock; (Suing Through His Next Of Kin; Koh Beng Guek) [2015] 10 CLJ 157 HC ***(refd)***

Batumalee Masilamani & Anor v. Thong Chan Leng & Anor [2003] 4 CLJ 95 HC ***(refd)***

Bujang Mat & Anor v. Lai Tzen Hai & Anor [2004] 4 CLJ 127 HC ***(refd)***

Dirkje Peiternell Halma v. Mohd Noor Baharom & Anor [1990] 2 CLJ 167 ***(refd)***

Dr Yusuff Mansur v. Changkat Jering Sdn Bhd & Anor [1997] 3 CLJ Supp 211 HC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Kerajaan Malaysia v. Global Upline Sdn Bhd & Another Appeal [2016] 1 LNS 1158 CA ***(refd)***

Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813 CA ***(refd)***

Lee Chong Keong v. Cheong Kok Weng & Anor [1995] 1 LNS 107 HC ***(refd)***

Seah Yit Chen v. Singapore Bus Service Ltd (1978) & Ors [1990] 1 LNS 56 ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***

United Plywood & Sawmill v. Lock Ngan Loi [1970] 1 LNS 164 FC ***(refd)***

Wong Khang Jong v. Ali & Anor [1969] 1 LNS 199 FC ***(refd)***

For the appellant - Rajes & Veronica; M/s Rajes & Assocs
For the respondent - Md Sofie; M/s VP Nathan & Partners

Reported by S Barathi

JUDGMENT

Mohamad Shariff Abu Samah JC:

Introduction

[1] This is an appeal against the decision of the Kelang Sessions Court delivered on 31 October 2017, on the amount of quantum of damages awarded which is manifestly low and without due consideration on the injuries suffered by the victim. It has purely caused a miscarriage of justice in view of the serious injuries suffered by the appellant/plaintiff;

[2] The appellant's/plaintiff's claimed against the respondent/defendant for general and special damages due to the respondent's negligence in handling motorcar No. WRR 3873 on 20 August 2014, when the plaintiff

was crossing the road from right to left, suddenly the respondent while driving at high speed and negligently from Jalan Batu Unjur without giving any signals and signs hit the plaintiff;

[3] Both parties had agreed and recorded the plaintiff at 50% liability 50% and the respondent at 50% liability. The appellant/plaintiff's appeal is merely on the quantum only;

The Sessions Judge's Decision

[4] On 31 October 2017, after hearing the appellant's witnesses, the Sessions Judge had allowed the quantum on 100% basis as below:

Ganti rugi Am

No.	Kecederaan	Award Mahkamah
a.	Severe head injury with multiple intracranial haemorrhage & psychosis	RM47,000.00
b.	Loss of consciousness and retrograde amnesia	Tiada award
c.	Erectile dysfunction	Tiada award
d.	Neurogenic bladder & Constipation	RM13,000.00
e.	Both eye trochlear nerve palsy resulting in double vision & loss of depth perception	RM15,000.00
f.	Degenerative spine disease	RM20,000.00
g.	Left profound senorineural hearing loss	Tiada award
h.	Laceration on the left pinna & scalp	RM4,500.00
i.	Scars	RM4,000.00
j.	Removal of glass fragment from forehead	Tiada award

Gantirugi Khas

No	Tuntutan Plaintif	Award Mahkamah
a.	Bayaran perjalanan keluarga untuk melawat plaintif di Hospital Tengku Ampuan Rahimah Klang	Tiada award
b.	Bayaran perjalanan bagi plaintif untuk mendapat rawatan pesakit susulan di HTAR Klang	Tiada award
c.	Kerosakkan pakaian/kasut/jam tangan/ telefon bimbit dan lain-lain	Tiada award

d.	Bil-bil hospital dan rawatan yang masih berlanjutan	Tiada award
e.	Laporan perubatan pakar/carian JPJ/ Polis/Adjuster	Tiada award
f.	Kos pembedahan dan rawatan bagi plaintif di masa akan datang	Tiada award
g.	Kehilangan pendapatan sebenar masa hadapan	RM15,000.00
h.	Kos perubatan/alat-alat ortopedik dan perbelanjaan perubatan lain yang masih berlanjutan	Tiada award
i.	Kos membeli alat pendengaran dan alat-alat akesori untuk alat pendengaran masa hadapan	Tiada award
j.	Kos membeli ubat 'viagra'	RM14,832.00
k.	Kos membeli cermin mata "Prism/Fresnel Spectacles with piano lenses"	Tiada award

The Court's Findings

[5] It is trite law based on a number of great authorities, an appellate court should but rarely interfere with the conclusion arrived at by the trial judge who has had the advantage of hearing the witnesses unless it is satisfied that the trial judge has acted on a wrong principle of law or has made a wholly erroneous estimate of damage suffered, either due to an omission to consider relevant materials or admitting irrelevant consideration. The cases in reference are *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 3 CLJ 813; and the case of *Kerajaan Malaysia v. Global Upline Sdn Bhd & Another Appeal* [2016] 1 LNS 1158; [2017] 1 MLJ 187.

[6] In another case of *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 (CA), Gopal Sri Ram JCA delivering the judgment of the court:

> … it is trite law that this court will not interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has no fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion …

[7] The Federal Court decision in *United Plywood & Sawmill v. Lock Ngan Loi* [1970] 1 LNS 164; [1970] 2 MLJ 237 (FC), Gill FCJ in delivering the judgment of the court:

> … As has been said again and again, the assessment of damages in cases of personal injury is one of the most difficult things for either a judge in the first instance or a Court of Appeal. When a man has lost his arm there is no sum in the world that can be in the true sense compensate for it.
>
> Yet compensation in the form of money is the only way in which he can be granted redress for injury he has suffered. It is neither possible nor desirable for damages for the loss of an arm to be standardised or rigidly classified, as no two cases are ever alike. But in order to maintain some semblance of uniformity, the amount awarded in past cases, which bear reasonable comparison with the case under review, should serve as useful guide.
>
> The general principle is that an appellate court can only interfere with an assessment if it is considered so inordinately low or inordinately high as to make the court exclaim. 'Good gracious, is that the sum which has been awarded-that sum must be altered', or if it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate …

Similarly, in the case of *Wong Khang Jong v. Ali & Anor* [1969] 1 LNS 199; [1970] 1 MLJ 56 (FC), Ong Hock Thye CH (Malaya) in delivering the judgment of the court:

> … The test which an appellate court has to apply in cases of appeal against quantum is that which LJ has expressed in vivid and meaningful language: 'Good gracious me, is this clearly wrong?: see: *Watson v. Powless* [1967] 3 All ER 721, 723. In more prosaic terms: "is this a wholly erroneous estimate? …

First Issue

General Damages

[8] Upon perusing the notes of evidence and the grounds of judgment, the accident had happened on 20 August 2014, the appellant had suffered serious and permanent injuries. This is clearly from the medical reports below:

(a) Medical Report Otorhinolaryngology Department Hospital Tengku Ampuan Rahimah dated 21 July 2015;

(b) Medical Report Ophthalmology Department Hospital Tengku Ampuan Rahimah dated 25 August 2015;

(c) Specialist Report Neurosurgeon Dr. Dharmendra Ganesan from UM Specialist Centre dated 28 August 2015;

(d) Specialist Report K. C. Chu Orthoptic Centre dated 22 September 2015;

(e) Medical Report Orthopedic Department Hospital Tengku Ampuan Rahimah dated 16 October 2015;

(f) Medical Report Ophthalmology Department Hospital Tengku Ampuan Rahimah dated 4 December 2015;

(g) Specialist Report Urologist Professor Azad Hassan Abdul Razack from Surgery Department, Medical Faculty, University Malaya dated 24 January 2016;

(h) Medical Report Psychiatry Department Hospital Tengku Ampuan Rahimah dated 2 December 2016;

(i) Medical Report Otorhinolaryngology Department Hospital Tengku Ampuan Rahimah bertarikh 4 December 2015;

(j) Specialist Report Otorhinolaryngology Dr. Prepageran from UM Specialist Centre dated 5 September 2016; and

(k) Specialist Report Urologist Dr. Ong Teng Aik from UM Specialist Centre dated 8 June 2017.

Sub-Issue (1)

Severe Head Injury With Multiple Intracranial Haemorrage And Phychosis Post Traumatic Brain Injury

[9] Having perused the above medical reports, it has come to my view that the appellant has suffered the above injuries due to the respondent's negligence. The learned Sessions Judge had awarded RM47,000. From the Medical Reports at pp. 68 to 75 Rekod Rayuan, in view of the serious head injuries, the appellant was warded at Intensive Care Unit (ICU). At that particular time, the appellant was unconscious and suffered from poor Glasgow Coma Scale, Intubated and ventilated, CT Scan showed minimal subarachnoid bleed in the right frontal parietal region, small intraparenchymal bleed in the right parietal region, subdural bleed in the left subtentorial region with mild right cerebral oedema, bilateral forth nerve palsy, left sided profound sensorineural hearing loss. The appellant had also suffered permanent disability as a result of injuries sustained such as headaches periodically, forgetfulness, insomnia lethargy, loses temper easily, expressive difficulties, left ear has significantly reduced hearing, unable to use the telephone, visual aberration unable to gauge depth, impaired peripheral visual field, double vision, psychosis post traumatic brain injury, lethargy, temperamental, impairment in the immediate and short term memory, risk of late onset post traumatic epilepsy, difficulty to express himself with the right words, unable to enjoy his usual recreational activity ie, playing badminton and unable to return to work.

[10] At pp. 68 to 75 rekod rayuan, the Neurologist Specialist, Dr Dharmendra Ganesan had determined the appellant's condition and both parties had agreed as below:

- He complains of headaches, forgetfulness, lethargy and temperamental,
- The neurocognitive assessment revealed impairment in the immediate and short term memory. These symptoms are part of post concussive syndrome. Considering the severity of the injury and the duration, these symptoms are most probably permanent.
- He runs risk of late onset post traumatic epilepsy due to the severe head injury and multiple intracranial hemorrhages.
- He has difficulty to express himself with the right words. This is consistent with injury to the dominant speech centre of the brain, which typically is the left inferior frontal lobe. This most probably would be a permanent disability, considering the duration since the accident.
- The head injury has resulted in the gentlemen having bilateral fourth nerve palsy. This has affected the synchronous eye movement. At a consequence, he has double vision at all gaze.
- He finds it difficult to gauge depth as well as he suffers from impaired peripheral visual field. This is most probably a permanent deficit.
- He would need to see an ophthalmologist and optometrists to prescribe corrective lenses to diminish the double vision.
- He has significant reduction of hearing in the left ear. He is not on able to use the telephone on that ear. Audiogram on the 23 December 2014 has established the fact that he has left sensorineural hearing loss. This is most probably a permanent disability.
- He has several scars on various parts of his body directly related to the accident example. Left ear, scalp, dorsum aspect of both hand, both knees and left flank. These scars are permanent blemish on the skin.

[11] At pp. 96 to 97 Rekod Rayuan, Specialist Report Dr. Charlie Siah Cha Hern stated that the plaintiff had suffered Psychosis Post Traumatic Brain Injury and elaborated as below:

- According to available medical records, patient was first seen on 8.09.2016. He had history of motor vehicle accident (pedestrian vs motorcar, sustained head injury, required ICU admission).
- Since then he had visual hallucination, associated with irritability and poor sleep on and off.

– Symptoms worsened 2 months prior presentation, whereby patient had difficulty to control his anger, started breaking hand phone and household items.

– He was diagnosed as psychosis post traumatic brain injury.

– He is maintained with T. Risperidone lmg ON and T. Vitamin B Complex 1/1 OP.

Having stated the above, to my mind there is nothing in the judgment of the Sessions Judge that showed that he had taken such consideration and the seriousness of the injuries sustained by the appellant. In considering these injuries and in guiding this court, I am in agreement with the judgment in the case of *Dr. Yusuff Mansur v. Changkat Jering Sdn Bhd & Anor* [1997] 3 CLJ Supp 211; [1997] 5 MLJ 530, Mohd Noor Ahmad J held that:

> … In determining the award, the proper approach was to consider the nature of the mental illness, its effects on the plaintiff and also the personality and intellectual capacity and the potential he had demonstrated before the accident and on the onset of his mental illness in 1987. An award of RM110,000.00 for the Plaintiff ...

The Court of Appeal had reinstated the Sessions Court award in the case of *Ang Yee Cheng & Anor v. Ang Siang Hock; (Suing Through His Next Of Kin; Koh Beng Guek)* [2015] 10 CLJ 157; [2016] 9 MLJ 238, where the court had awarded RM300,000 for brain injuries as stated:

> … Head injury – brain contusion and left front parietal acute subdural haematoma with cerebral oedema …
>
> … The plaintiff as a result suffers from brain damage, severe neurological disabilities, severe speech impairment, post traumatic encephalomalacia of the brain, post traumatic epilepsy, inability to move the right upper limb, weakness of the right lower limb or right hemiparesis and requires assistance for daily living activities …

In considering the brain injuries and permanent disabilities as above, the appellant was only 37 years of age, sole breadwinner of six children, in view of these injuries the appellant cannot perform any work, and would definitely affect their source of income. Above all, the appellant had become aggressive and violent without the ability to control himself and had become emotionally disturbed. The appellant had to undergo the whole life treatment especially psychiatry, viewing, hearing, erectile dysfunction and neurogenic bladder and constipation. It is my considered view that the award be substituted with the amount of RM200,000.

Sub-Issue (2)

Loss Of Consciousness And Retrograde Amnesia

[12] The learned Sessions Judge did not award anything on this. At p. 72 Rekod Rayuan, the Neurologist Specialist Report had maintained that the appellant was unconscious when first brought to the hospital. He had lost memory due to the accident occurred. The neurologist has described the following:

> … the neurocognitive assessment revealed deficit in the immediate and short term memory …

Having referred to the Revised Compendium of Personal Injury Awards prepared by the Task Force to Review Compendium of Personal Injury Awards of Bar Council Malaysia, to my mind the award of RM5,000 would be fair and justifiable in view of the appellant having not only suffered loss of consciousness but also retrograde amnesia.

Sub-Issue (3)

Erectile Dysfunction

[13] It is to be noted that before the accident occurred, the appellant had six children and had good affairs with the wife. Nevertheless, due to the accident the appellant is unable to perform sexual intercourse with his wife. At pp. 57 to 59 Rekod Rayuan, the Specialist Report Urologist Professor Dr. Azad Hassan Abdul Razak had stated that:

- He has problem with erection since that accident
- He has not noticed any nocturnal or early morning erection.
- He is unable to have sexual intercourse, as his erection is not hard enough.
- In view of this he has not attempted any sexual activity over the past one year, although he still has a normal libido.
- His sexual activity is also restricted by the pain in his left hip.
- His International Index of erectile function -5 (IIEF-5) is 10 indicating moderate degree of erectile dysfunction (ED).
- The other problem is with regard to his erectile function. He had moderate degree of ED based on the IIEF-5 score. His ED is likely to be permanent. He will require medical treatment to be sexually active.
- He still continues to have ejaculation but is not present all the time during his sexual activity.
- His ability to impregnate his wife will also be reduced compared to prior to the accident.

The learned Sessions Judge did not award anything on this. In considering this issue I would have noted on several issues namely, the appellant had six children and was able to have sexual intercourse with his wife before the accident. In view of the accident, the appellant's poor erection after the accident, penile erection hardness was reduced, he experienced "shortness of breath" with sexual intercourse, ejaculation could be achieved occasionally, but the sensation of orgasm was diminished and his sexual activity is also restricted by the pain in his hip. The chances of getting a child would be diminished, it would definitely affect the quality of life, the negative psychological impact on the family and this would cause a permanent disability according to the specialist. As such, I would award erectile dysfunction of RM30,000.

Sub-Issue (4)

Neurogenic Bladder And Constipation

[14] At pp. 57 to 59 Rekod Rayuan, according to the appellant's Urologist Report, Professor Azad Hassan Abdul Razack had confirmed that the appellant was having problems on the following:

- He opens his bowels once a week
- He has problems with micturition. He has frequency and voids about 1-2 times per hour
- He has also noted urgency where he has to rush to toilet immediately when he has the urge.
- This patient sustained a very severe head injury after the RTA. Based on the report from neurosurgeon he still has some residual effects of the injury present and is likely to be permanent.
- His main urological problems are bladder over activity and ED. The problem of bladder over activity is secondary to the head injury sustained.
- The main central nervous system control of bladder is inhibitory in nature to ensure coordinated micturition at the appropriate time.
- There will be loss of this inhibitory function after the severe head injury suffered by this patient resulting in frequency and urgency of micturition.
- It is best to do an urodynamics study to confirm this. It is very likely that the patient will require antimuscuranics or B3 agonist to control the over active bladder.
- This problem is likely to be permanent and he will require lifelong treatment. If he does not respond to the oral medication and if the over activity is confirmed by urodynamics, he might require regular botulinium toxin A injection to the bladder to control his symptoms.

[15] Similarly, at pp. 112 to 118 Rekod Rayuan, the respondent's Urologist Dr. Ong Teng Aik in his report had confirmed:

- His urine flow rate was slow, especially after he held his bladder for too long. Nocturia was also a problem, as he needed to wake up 5-6 times at night to pass urine.
- Uroflow measurement showed an obstructive flow pattern.
- The maximum flow rate [Qmax] was 11.8 ml/s, with a voided volume of 192ml.
- The patient might benefit from urology follow-up and medication [example: alpha blocker] to manage his lower urinary tract symptoms.

In view of the above, the Neorogenic Bladder and Constipation would definitely cause negative impact to the appellant and having problem to perform any work. This had also caused a permanent disability to the Appellant. In view of this, the award by the Sessions Judge is to be increased from RM13,000 to RM15,000.

Sub-Issue (5)

Both Eye Trochlear Nerve Palsy Resulting In Double Vision At All Gaze And Loss Of Depth Perception

[16] At pp. 76 and 77 Rekod Rayuan, the Medical Report of Dr. Ng Lav Hui stated that the appellant has diplopia in medial and lateral gaze. Both eyes trochlear nerve palsy secondary to severe brain injury. At pp. 68 to 75 Rekod Rayuan, the Neurologist, Dr Dharmendra Ganesan in his specialist report indicated below:

- Visual aberration, unable to gauge depth, impaired peripheral visual field, double vision
- The visual aberration resulted in slowness in most activity such as eating, reading papers, etc.
- Visual activity within normal range, diminished peripheral visual field on confrontation, diplopia at all gaze
- The head injury has resulted in the gentleman having bilateral fourth nerve palsy.
- This has affected the synchronous eye movement
- As a consequence he has double vision at all gaze.
- He finds it difficult to gauge depth as well as he suffers from impaired peripheral visual field.
- This is most probably permanent deficit

The Orthoptic Specialist, K.C. Chu in his report at pp. 63 to 65 Rekod Rayuan stated as follow:

- Bilateral Superior Oblique Palsies/Bilateral 4th Cranial nerve palsies. Tight being more affected.
- Components of diplopia elicited are horizontal, vertical and with some degree of Excyclotorsion measured.
- The degree of deviation varies depending on his position of gazes.
- With the presence of diplopic images he finds difficulty in his daily activities.
- I have advised him to be more careful especially when going down the stairs, stepping over drains and in general walking around due to the disruption of his Binocular Single Vision (BSV).
- The loss of BSV results in, inability to gauge depth perception.
- The lack of depth perception means he is not suitable to drive and may affect his job performance.

At pp. 60 to 61 Rekod Rayuan, the Ophthalmologist Specialist, Dr Indira Nadras in her report stated that:

- There was presence of diplopia in every gaze except primary gaze.
- He was treated conservatively.
- Orthoptic Assessment with investigative results confirmed Bilateral Superior Oblique /4th cranial nerve palsies with right more affected than left. Diplopia was elicited in all gazes but varies in degree of deviation depending on his position of gaze.
- In the presence of diplopia and loss of binocular single vision, he has difficulty in daily activities.
- He also has difficulty to judge depth perception which will make him difficult to drive and affect his job performance.

In view of the learned Sessions Judge did not consider the appellant having problem with his vision and unable to work and proper interaction with the family, the award by the Sessions Judge be reviewed from RM15,000 to *RM40,000.*

Sub-Issue (6)

Degenerative Spine Disease L5 And S1

[17] The Orthopedic Specialist, Dr Ruban Sivanoli in his report at p. 62 Rekod Rayuan had confirmed that the appellant suffered from "Degenerative Spine Disease L1 S1". In view of this, the appellant could not carry heavy thing and this would prolong for the whole life.

The award by the Sessions Judge should be increased from RM20,000 to RM30,000.

Sub-Issue (7)

Left Profound Senorineural Hearing Loss

[18] At pp. 78 and 79 Rekod Rayuan, Otorhinolaryngology Specialist, Dr Tang Phing Phing in his report stated that:

> … Patient was scheduled for formal hearing assessment on 23/12/2014 which showed normal hearing on the right ear and left side profound sessorineural hearing loss based on Pure Tone Audiometry.

It is also supported by the Neurologist Report, Dr Dharmendra Ganesan at pp. 68 to 75 Rekod Rayuan as follows:

- He has significant reduction of hearing in the left ear. He is not able to use the telephone on that ear.
- Audiogram on the 23/12/2014 has established the fact that he has sensorineural hearing loss.
- This is most probably permanent disability.

At pp. 102 till 107 Rekod Rayuan, the respondent's Specialist, Dr Prepageran in his report:

> … On assessment of hearing, turning fork examination revealed right positive Rhine and left Rhine no response.
>
> Weber Central while Free field voice test indicated the ability to hear whisper from 2 feet and no response on the left …

To this effect, I hardly find that the learned Sessions Judge had fully considered this issue when no award was given to the appellant. As such, based on the Revised Guidelines for Awards in Personal Injury, I award the appellant RM20,000.

Sub-Issue (8)

Lacerations On The Left Pinna & Scalp

[19] At pp. 78 and 79 Rekod Rayuan, Dr Tang Phing Phing recorded in his report:

- Laceration wound seen over left pinna and scalp
- Toileting and suturing was done by ENT team on 20/8/2014

Similarly, in the neurologist specialist report, Dr Dharmendra Ganesan had recorded:

- Laceration scar on the left ear
- There is a scalp lump about 4cm in diameter at the left temporal region of the scalp

In furtherance, at pp. 68 to 75 Rekod Rayuan, Dr Shashi Gopalan a/l Marimuthu in his report: A

– Laceration wound seen over left pinna and scalp region

– Bilateral EAC was cleared with intact tympanic membrane

The Sessions' Judge award is reviewed from RM4,500 to RM7,000. B

Sub-Issue (9)

Scars

[20] The Neurologist Specialist, Dr Dharmendra Ganesan in his report at pp. 68 to 75 Rekod Rayuan: C

– Laceration scar on the left ear

– Abrasion scar on dorsum of hands and knees

– Abrasion scar on the left flank

D

This was also confirmed by the Medical Report, Professor Azad Hassan Abdul Razack at pp. 57 to 59 Rekod Rayuan that there were multiple healed abrasion scars over hands and knees. In view of this permanent disability, I awarded the appellant's claim to RM10,000.

Sub-Issue (9) E

Removal Of Glass Fragment From Forehead

[21] Based on the respondent's Medical Specialist, Dr. Prepageran from UM Specialist Centre in his report at pp. 102 to 107 Rekod Rayuan, there was an operation to remove the glass fragment from the appellant's forehead. Nevertheless the Session Judge did not consider this issue and no award was made to the appellant. As such I award the appellant with RM2,000. F

The learned counsel for the respondent had argued that there were overlapping in the appellant's claim and there should be 10% deduction from the amount claimed. With respect, in the case of *Seah Yit Chen v. Singapore Bus Service (1978) Ltd & Ors* [1990] 1 LNS 56; [1990] 3 MLJ 144, the court held that: G

> ... where injuries sustained are related to same part or function of body there should be only one award, but if injuries are to different parts of body and affect different functions then it is appropriate to make separate award for each head of damage … H

Having considered every aspect of the case, to my mind the issue of overlapping forwarded by the respondent's counsel is without merit and justification.

I

Second Issue

Special Damages

On the issue of special damages, I will confined on two sub-issues namely:

(i) Loss of actual future earnings;

(ii) Cost of purchasing "Viagra"

Sub-Issue (1)

Loss Of Actual Future Earnings

[22] The learned Sessions Judge did not allowed any special damages as claimed by the appellant. The learned judge only award RM15,000 for this sub-issue. The appellant claimed for RM540,000. In (SP1) evidence, who worked as Accounts Clerk at Shah Alam Tyres & Auto Accessories Sdn. Bhd. had confirmed that the appellant worked as car sprayer at the company. Before the accident happened, the appellant had received commission at an average of RM5,000 monthly salary. Nevertheless the company did not pay further monthly salary or commission after the accident as the appellant did not come to work. A letter from the employer was tendered as exh. (P1) and cash payment voucher was tendered as (P2). These two exhibits were never denied by the respondent but the Sessions Judge did not even take into consideration as the appellant's salary and payment voucher. I hardly find any reasons forwarded by the Sessions Judge in his grounds of judgment as to how he gets the multiplier (RM1,500) and multiplicand (ten months) in order to award RM15,000. The appellant was only 37 years old, and the multiplier would be:

$$\frac{55-37}{2} = \frac{18}{2} = 9 \text{ tahun}$$

Having had the accident, the appellant could not be able to work as car sprayer. I have taken note of the Specialist Report, K.C. Chu Orthoptic Centre at pp. 63-65 Rekod Rayuan as follows:

> ... e) With the presence of diplopic images he finds difficulty in his daily activities. I have advised him to be more careful especially when going down the stairs, stepping over drains and in general walking around due to the disruption of his Binocular Single Vision (BSV).The loss of BSV results in, inability to gauge depth perception. The lack of depth perception means he is not suitable to drive and may affect his job performance …

At pp. 60 and 61 Rekod Rayuan, Medical Report Ophthalmology Department Hospital Tengku Ampuan Rahimah stated that:

> … In the presence of diplopia and loss of binocular single vision, he has difficulty in daily activities. He also has difficulty to judge depth perception which will make him difficult to drive and affect his job performance …

Based on the medical reports above, I have also considered the case of *Lee Chong Keong v. Cheong Kok Weng & Anor* [1995] 1 LNS 107; [1996] 4 MLJ 133, Chen Fook Yen J held that:

> … In assessing general damages, the future loss of earnings and loss of earning capacity can be implied in law, and is included in cases where the injuries suffered were such as to lead to continuing or permanent disability. The trial judge has not misdirected himself even with the scanty medical report regarding the loss of earning capacity. Being a manual worker, the plaintiff had undoubtedly suffered a set-back for life, especially with some wasting of the right forearm muscles and shortening of the leg concerned. Therefore the award of RM 12,600 was not unwarranted and the appeal should not be allowed …

The Supreme Court decision in the case of *Dirkje Peiternell Halma v. Mohd Noor* [1990] 2 CLJ 167; [1990] 3 MLJ 103 (SC), the Supreme Court held that:

> … The appellant is entitled to be compensated for her loss of earning capacity. There was evidence that she was earning $ 1270 per month. There was also evidence that after the accident she was practically a vegetable and would have to be nursed for the rest of her working life …

Similarly, in the case of *Batumalee Masilamani & Anor v. Thong Chan Leng & Anor* [2003] 4 CLJ 95, Suriyadi J held that:

> … From the facts it was crystal clear that he was most comfortable in his mother tongue, and as reflected by the job he held, he was not a highly educated man; from the other evidence his physical strength was his only asset to pep up his monthly income. And now he is debilitated by physical afflictions.
>
> …
>
> With his antecedents and background … I am unable to pinpoint any job the appellant could take up, that does not require physical strength. His inability to squat fully or stand on his right leg without too long, a limitation of flexion of the right knee joint, a patella distorted with the loss of congruity, a generalized wasting of his right lower limb, and walking with a mild limp which were clearly documented in the specialist reports how could he?
>
> …
>
> Expecting him to become an Amway salesman overnight, with such a poor educational background and lack of language and selling skill is a desperate act on the part of the defendant to impose the impossible on the appellant. Possibilities based on speculation are there, but we are a living in a real world where probability is the yardstick …

Based on the above authorities, it is my considered view that the learned Sessions Judge had wrongly applied the correct principles of multiplier and multiplicand in calculating the appellant's actual income. The calculation should be: RM2,800 x 9 x 12 = RM302,400. As such, I would allow and award the appellant RM300,000.

Sub-Issue (2)

Cost Of Purchasing "Viagra" For Whole Life

[23] As the appellant had suffered serious injuries, he has to consume "Viagra" medication his whole life to sexual intercourse with his wife. At pp. 57, 58 and 59 Rekod Rayuan, the plaintiff's Urologist Specialist Professor Azad Hassan Abdul Razack had suggested the following treatments and medication for appellant's "erectile dysfunction", namely:

> … The other problem is with regards to his erectile function. He has moderate degree of ED based on the IIEF -5 score. His ED is likely to be permanent. He will require medical treatment to be sexually active.
>
> The options of treatment include Oral PDE5 inhibitors, prostaglandin injection, vacuum device or penile implant in that order. The cost of the treatment is as follows:
>
> 1. PDE5 Inhibitors will cost around RM100.00 per week
> 2. Prostaglandin injections will cost around RM150.00 to RM200.00per week
> 3. Vacuum device will be one off cost around RM1,000.00 with possible replacement once or twice in a life time.
> 4. Penile implant will be one off cost around RM25,000.00 …

Similarly, the defendant's Urologist Specialist, Dr. Ong Teng Aik in his report at pp. 112 to 118 Rekod Rayuan:

> … The patient will benefit from the use of Phosphodieterase 5 Inhibitors [PDE51] (example: Viagra, Levitra or Cialis). The cost of PDE51 at the current market price is about RM50 per/tablet. Recently, generic "Viagra" ie sildenafil is available to the Malaysian market. The cost is about RM15.00 per tablet. The patient might need one or two tablets per week [first line therapy]. If the patient failed to respond to PDE51 inhibitors he would be put on a trial of intracavernosal injection of Caverjet [prostaglandin El] [estimated cost: RM120/Caverjet, twice a week] or vacuum pump (estimate cost: RM6,000.00per device). These are 2nd line therapy.
>
> If the above measures fail, implantation of penile prosthesis would be the last option [estimated cost: RM30,000.00for the device) (3rd line therapy] …

In the case of *Bujang Mat & Anor v. Lai Tzen Hai & Anor* [2004] 4 CLJ 127; [2004] 6 MLJ 376 at 393, Clement Skinner J held that:

> ... [50] I would accordingly allow the appeal against the award for the second period of 27 years and vary the award for costs of post trial future nursing car of RM 588,000 made by the learned Sessions Court judge in respect of the first plaintiff in the following manner:
>
> Life expectancy 69.4 years
>
> Age at time of trial 22 years
> 47 years (rounded off)
>
> Less 1/3 for contingencies 16 years
> 31 years
>
> Cost for nursing care for 31 years:
>
> 31 x 12 x RM1,500 = RM558,000 To summaries:
>
> For pre-trial costs of nursing care RM26,000
>
> For post-trial cost of nursing care RM558,000

Based on the above case, the calculation would be:

[72 tahun - 37 tahun] = [35 tahun - 1/3] = 23.3 tahun

As the cost for purchasing viagra is RM150 for a week or RM7,200 for one year, the cost would be:

RM7,200 x 23.3 tahun = RM167.760

As such, I would award the appellant for RM100,000

Conclusion

[24] Having perused the written submission by both parties, it is pertinent to note the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 (FC), Steve Shim CJ (Sabah and Sarawak) (as His Lordship was) in delivering the judgment of the court:

> … The Court of Appeal had clearly borne in mind the central feature of appellate intervention i.e., to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. *In so doing, the Court of Appeal was perfectly entitled to examine the process of the evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This was reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on*

appeal. This was consistent with the established "plainly wrong" test. Therefore, there was no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. What the Court of Appeal had done was merely to accentuate the established "plainly wrong" test consistently applied by the appellate courts in this country …

[25] In view of the court's finding of facts, it is my considered view that there is clearly a misdirection of fact and law by the learned Sessions Court Judge which requires this court's intervention to put things right and correct the decision of the lower court. I could not resist to state that the oral evidence of the appellant's witnesses tested with the contemporaneous documents as well as the respondents' witnesses did support appellant's/plaintiff's pleaded case. In the light of the foregoing and in the upshot, I allow the appeal and reverse the Sessions Judge's decision. The summary of the award as follows:

Ganti rugi Am

No.	Kecederaan	Award Mahkamah Sesyen	Award Mahkamah Tinggi
a.	Severe head injury with multiple intracranial haemorrhage & psychosis	RM47,000.00	RM200,000.00
b.	Loss of consciousness and retrograde amnesia	Tiada award	RM5,000.00
c.	Erectile dysfunction	Tiada award	RM30,000.00
d.	Neurogenic bladder & constipation	RM13,000.00	RM15,000.00
e.	Both eye trochlear nerve palsy resulting in double vision & loss of depth perception	RM15,000.00	RM40,000.00
f.	Degenerative spine disease	RM20,000.00	RM25,000.00
g.	Left profound senorineural hearing loss	Tiada award	RM20,000.00

h.	Laceration on the left pinna & scalp	RM4,500.00	RM7,000.00
i.	Scars	RM4,000.00	RM10,000.00
j.	Removal of glass fragment from forehead	Tiada award	RM2,000.00

Ganti rugi Khas

No.	**Tuntutan Plaintiff**	**Award Mahkamah Sesyen**	**Award Mahkamah Tinggi**
a.	Kehilangan pendapatan sebenar masa hadapan	RM15,000.00	RM300,000.00
b.	Kos membeli ubat 'viagra'	RM14,832.00	RM100,000.00